

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MAURICE WASHINGTON,)	
)	
Petitioner,)	
)	
v.)	CIV 08-00806 PHX PGR (MEA)
)	
DORA SCHRIRO and)	REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,)	
)	
Respondents.)	
_____)	

TO THE HONORABLE PAUL G. ROSENBLATT:

On April 28, 2008, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondents filed an Answer to Petition for Writ of Habeas Corpus ("Answer") (Docket No. 10) on October 14, 2008. Respondents argue the action for habeas relief was not timely filed and that Petitioner procedurally defaulted his claims in the state courts and, therefore, that the petition must be denied and dismissed with prejudice. Petitioner filed a reply to the answer to his petition on December 3, 2008. See Docket No. 13.

I Procedural History

On October 29, 2001, a Maricopa County grand jury indictment charged Petitioner with one count of first-degree

1 murder. Answer, Exh. A. The indictment included the allegation
2 that the offense involved "the discharge, use, or threatening
3 exhibition of a gun, a deadly weapon or dangerous instrument,
4 and/or the intentional or knowing infliction of serious physical
5 injury." Id., Exh. A.

6 On April 30, 2002, a jury found Petitioner guilty of
7 the lesser-included offense of second-degree murder. Id., Exh.
8 B. The jury determined that Petitioner "commit[ted] a dangerous
9 offense by the use or threatening exhibition of a deadly
10 weapon." Id., Exh. B & Exh. C. On June 18, 2002, Petitioner
11 was sentenced to an aggravated term of twenty years imprisonment
12 pursuant to this conviction. Id., Exh. D. The trial court
13 imposed an aggravated sentence, *inter alia*, because Petitioner
14 had committed the offense for pecuniary gain. Id., Exh. E. The
15 trial court also found the death occurred in a particularly
16 cruel and heinous manner. Id., Exh. E.

17 Petitioner took a timely direct appeal of his
18 conviction and sentence. Id., Exh. H. Petitioner's appointed
19 appellate counsel filed a brief in compliance with Anders v.
20 California, stating he had reviewed the record and could not
21 find a non-frivolous claim to raise on Petitioner's behalf.
22 Id., Exh. H. Appointed appellate counsel also averred that he
23 had contacted Petitioner to "solicit" issues to raise on appeal,
24 but that Petitioner identified "no issues he wishes counsel to
25 raise." Id., Exh. H.

26 Accordingly, the Arizona Court of Appeals reviewed the
27 trial record for fundamental error, and affirmed Petitioner's

1 conviction and sentence in a decision issued January 7, 2003.
2 Id., Exh. J. The Arizona Court of Appeals noted Petitioner had
3 failed to file a supplemental *pro se* brief in his direct appeal,
4 even though he had been granted an opportunity to do so after
5 his counsel filed an Anders brief. Id., Exh. J. Petitioner
6 sought review of his conviction and sentence by the Arizona
7 Supreme Court, which denied relief on August 1, 2003. Id., Exh.
8 K. The mandate of the Court of Appeals affirming Petitioner's
9 conviction and sentence issued September 4, 2003. Id., Exh. L.

10 On January 11, 2005, more than one year after his
11 conviction became final, Petitioner filed an action seeking
12 state post-conviction relief pursuant to Rule 32, Arizona Rules
13 of Criminal Procedure. Id., Exh. M. Petitioner asserted, *inter*
14 *alia*, that his Sixth Amendment rights were violated by his
15 sentence, citing the United States Supreme Court's 2004 opinion
16 in Blakely v. Washington. Id., Exh. M. Petitioner also alleged
17 he was denied his right to the effective assistance of counsel.
18 Id., Exh. M.

19 The state trial court denied post-conviction relief in
20 a decision issued January 25, 2005. Id., Exh. N. The state
21 court determined Petitioner's Rule 32 action was not timely.
22 Id., Exh. N. The trial court also concluded Petitioner was not
23 entitled to relief pursuant to Blakely:

24 In Blakely, the United States Supreme Court,
25 held that pursuant to its decisions in
26 Apprendi v. New Jersey, 530 U.S. 466 (2000)
27 and Ring v. Arizona, 536 U.S. 584 (2002), a
[d]efendant is entitled to a jury's
determination of any fact that increases the
penalty for a crime beyond the prescribed

1 statutory maximum. However, in Schirro (sic)
2 v. Summerlin, 542 U.S. [348][,] 124 S.Ct.
3 2519 (2004), the Court also held that
4 although Ring and Apprendi constitute a
5 significant change in the law, this change is
6 procedural, but not a watershed procedural
7 rule, and does not apply retroactively to
8 convictions that are final. The Arizona
9 Appellate Courts also have declared that Ring
10 and Apprendi do not apply retroactively to
11 convictions that are final. State v. Towery,
12 204 Ariz. 386 [] (2003); State v. Sepulveda,
13 201 Ariz. 158 [] (App. 2001)....

14 Id., Exh. N at 1.¹

15 Petitioner sought review of this decision by the
16 Arizona Court of Appeals, which denied review on September 27,
17 2005. Id., Exh. O.

18 Petitioner filed his federal habeas petition on April
19 28, 2008. Petitioner asserts he is entitled to relief because
20 the trial court violated his Sixth Amendment right to a jury
21 trial by sentencing him to an aggravated term of imprisonment
22 based on facts found by the trial court and not the jury. See
23 Petition at 6.

24 **II Analysis**

25 **Relevant statute of limitations**

26 The Petition for Writ of Habeas Corpus is barred by the
27 applicable statute of limitations as found in the Antiterrorism
28 and Effective Death Penalty Act ("AEDPA").

29 ¹Rule 32.1, Arizona Rules of Criminal Procedure, provides
30 grounds for relief in post-conviction proceedings. Rule 32.1(g)
31 states that a defendant is entitled to relief if "[t]here has been a
32 significant change in the law that if determined to apply to
33 defendant's case would probably overturn the defendant's conviction
34 or sentence."

1 The AEDPA imposed a one-year statute of limitations on
2 state prisoners seeking federal habeas relief from their state
3 convictions. See Lott v. Mueller, 304 F.3d 918, 920 (9th Cir.
4 2002). The AEDPA provides that a petitioner is entitled to
5 tolling of the statute of limitations during the pendency of a
6 "properly filed application for state post-conviction or other
7 collateral review with respect to the pertinent judgment or
8 claim." 28 U.S.C. § 2244(d)(2)(2006 & Supp. 2008). See also
9 Artuz v. Bennet, 531 U.S. 4, 8, 121 S. Ct. 361, 363-64 (2000);
10 Harris v. Carter, 515 F.3d 1051, 1053 (9th Cir. 2008).

11 Petitioner's conviction and sentence became final on or
12 about November 1, 2003, ninety days after the state Supreme
13 Court denied review, when the time expired for seeking
14 certiorari from the United States Supreme Court. Accordingly,
15 the one-year statute of limitations on Petitioner's federal
16 habeas action expired on November 1, 2004, unless it was tolled
17 by any pending action for state post-conviction relief. See
18 Bunney v. Mitchell, 262 F.3d 973, 974 (9th Cir. 2001).

19 Petitioner did not have any action for post-conviction
20 relief pending in the state courts from November 1, 2003,
21 through November 1, 2004. Petitioner allowed more than one year
22 of time to pass after the date that his conviction became final
23 and the filing of his first state action for post-conviction
24 relief on January 11, 2005. Petitioner's first state Rule 32
25 action could not and did not re-start the expired statute of
26 limitations regarding his federal habeas action. See Ferguson
27 v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003), citing Tinker

1 v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001); Preston v.
2 Gibson, 234 F.3d 1118, 1120 (10th Cir. 2000). A state-court
3 petition that is filed after the expiration of the statute of
4 limitations under the AEDPA does not revive the running of the
5 limitations period. See Jiminez v. Rice, 276 F.3d 478, 482 (9th
6 Cir. 2001); Fisher v. Gibson, 262 F.3d 1135, 1142-43 (10th Cir.
7 2001); Payton v. Brigano, 256 F.3d 405, 408 (6th Cir. 2001).
8 Accordingly, the federal habeas action is not timely.

9 Neither does Blakely provide for an alternative date
10 for beginning the statute of limitations regarding Petitioner's
11 habeas action. Section 2244 provides the statute of limitations
12 regarding a federal habeas claim may begin to run on the "date
13 on which the constitutional right asserted was initially
14 recognized by the Supreme Court, if the right has been newly
15 recognized by the Supreme Court and made retroactively
16 applicable to cases on collateral review." 28 U.S.C. §
17 2244(d)(1)(()). This section is not applicable to Petitioner's
18 Blakely claim because the United States Supreme Court has not
19 made Blakely retroactive to cases on collateral review. See
20 Schardt v. Payne, 414 F.3d 1025, 1038 (9th Cir. 2005). See also
21 Tyler v. Cain, 533 U.S. 656, 662, 121 S. Ct. 2478, 2482 (2001)
22 (holding that a new rule is "made retroactive to cases on
23 collateral review" only if the Supreme Court holds it to be
24 retroactively applicable to cases on collateral review).

25 Even allowing that the statute of limitations on a
26 federal habeas action asserting a Blakely claim began to run
27 when Petitioner's second state action for post-conviction relief
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1 concluded, on October 27, 2005, Petitioner's federal habeas
2 action, filed in April of 2008, more than two years later, is
3 not timely filed. Additionally, the untimely-filed second state
4 petition for post-conviction relief could not toll the statute
5 of limitations on Petitioner's federal habeas action because a
6 state petition that is not filed within the state's required
7 time limit is not "properly filed." Pace v. DiGuglielmo, 544
8 U.S. 408, 413, 125 S. Ct. 1807, 1811-12 (2005).

9 Because Petitioner did not file his federal habeas
10 action within the period specified by the AEDPA, his petition
11 for habeas relief may only be considered if the AEDPA's time
12 limitation may be "equitably" tolled in his case. See Harris,
13 515 F.3d at 1053-54 & n.4; Allen v. Lewis, 255 F.3d 798, 800
14 (9th Cir. 2001). The Ninth Circuit Court of Appeals has
15 determined that equitable tolling is available only if
16 extraordinary circumstances beyond the petitioner's control made
17 it impossible to file a federal habeas petition on time. See
18 Harris, 515 F.3d at 1055-56 (discussing standard and holding
19 equitable tolling was warranted when the petitioner had relied
20 on prior Circuit Court of Appeals precedent regarding the timely
21 filing of his petition); Malcom v. Payne, 281 F.3d 951, 962 (9th
22 Cir. 2002). Equitable tolling is only appropriate when external
23 forces, rather than a petitioner's lack of diligence, account
24 for the failure to file a timely claim. See Harris, 515 F.3d at
25 1055 (stating a petitioner's "oversight, miscalculation," or
26 "negligence" would not warrant equitable tolling); Miles v.
27 Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).

1 A federal habeas petitioner seeking equitable tolling
2 must also act with "reasonable" diligence throughout the period
3 he seeks to toll. See e.g., Bryant v. Arizona Att'y Gen., 499
4 F.3d 1056, 1061 (9th Cir. 2007); Warren v. Garvin, 219 F.3d 111,
5 113 (2d Cir. 2000); Jones v. Morton, 195 F.3d 153, 159 (3d Cir.
6 1999). It is Petitioner's burden to establish that equitable
7 tolling is warranted in his case. See Bryant, 499 F.3d at
8 1059-60 (holding the petitioner must establish a causal
9 connection between the cause of his delay and the delay itself).

10 In his reply to the answer to his petition Petitioner
11 asserts he was unable to file a pro se brief in his direct
12 appeal because he is uneducated in the law. See Docket No. 13.
13 Petitioner contends the statute of limitations did not begin to
14 run until he understood the factual predicate for his habeas
15 claim, which could not occur earlier because the "Arizona
16 Department of Corrections has permanently closed on all prison
17 law libraries..." Id. Petitioner also asserts the ADOC does
18 not provide legal assistance of any kind except for a "para
19 legal who hands out forms and helps you only with initial
20 filing." Id. Petitioner contends he has been denied his right
21 to access the courts. Additionally, Petitioner contends there
22 were extraordinary circumstances that made it impossible to
23 timely file his habeas petition. Petitioner asserts the
24 extraordinary circumstances were the denial of access to "case
25 law."

26 Petitioner has not met his burden of establishing that
27 there were extraordinary circumstances beyond his control which
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1 made it impossible for him to file a timely federal habeas
2 petition, or that any state action was the cause for his failure
3 to timely file his federal habeas action. See Pace, 544 U.S. at
4 414; 125 S. Ct. at 1815 (concluding that the petitioner was not
5 entitled to equitable tolling because he was misled or confused
6 about timing of exhausting his state remedies and filing his
7 federal habeas petition); Raspberry v. Garcia, 448 F.3d 1150,
8 1154 (9th Cir. 2006); Shannon v. Newland, 410 F.3d 1083, 1090
9 (9th Cir. 2005) ("Each of the cases in which equitable tolling
10 has been applied have involved wrongful conduct, either by state
11 officials or, occasionally, by the petitioner's counsel.").
12 Compare Sanchez v. Cambra, 137 Fed. App. 989, 990 (9th Cir.
13 2005), cert. denied, 126 S. Ct. 1333 (2006); Corjasso v. Ayers,
14 278 F.3d 874, 877-78 (9th Cir. 2002).

15 Petitioner does not claim he was misled about the
16 statute of limitations. A petitioner's *pro se* status, ignorance
17 of the law, and lack of representation during the applicable
18 filing period do not constitute extraordinary circumstances
19 justifying equitable tolling. See, e.g., Miranda v. Castro, 292
20 F.3d 1063, 1066-67 & n.4 (9th Cir. 2002); Fisher v. Johnson, 174
21 F.3d 710, 714-716 (5th Cir. 1999); Shoemate v. Norris, 390 F.3d
22 595, 598 (8th Cir. 2004) (holding that petitioner's
23 misunderstanding of state's "rules, statutes, and the time
24 period set forth therein do not justify equitable tolling").

25 Neither has Petitioner established that he acted with
26 diligence during the time period he seeks to toll, as Petitioner
27 allowed more than two years to pass without seeking any form of

1 state or federal relief from his conviction and sentence prior
2 to filing his 2008 federal habeas action alleging a claim based
3 on a 2004 Supreme Court decision.

4 **III Conclusion**

5 Petitioner's petition for a writ of habeas corpus is
6 barred by the statute of limitations applicable to it pursuant
7 to the AEDPA. Petitioner has not shown that the circumstances
8 of his case warrant application of equitable tolling so that
9 this Court may address the merits of his petition for a writ of
10 habeas corpus.

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12 **IT IS THEREFORE RECOMMENDED** that Mr. Washington's
13 Petition for Writ of Habeas Corpus be **denied and dismissed with**
14 **prejudice.**

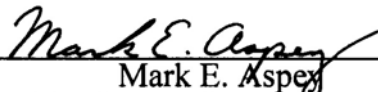
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16 This recommendation is not an order that is immediately
17 appealable to the Ninth Circuit Court of Appeals. Any notice of
18 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
19 Procedure, should not be filed until entry of the district
20 court's judgment.

21 Pursuant to Rule 72(b), Federal Rules of Civil
22 Procedure, the parties shall have ten (10) days from the date of
23 service of a copy of this recommendation within which to file
24 specific written objections with the Court. Thereafter, the
25 parties have ten (10) days within which to file a response to
26 the objections. Pursuant to Rule 7.2, Local Rules of Civil
27 Procedure for the United States District Court for the District
28

1 of Arizona, objections to the Report and Recommendation may not
2 exceed seventeen (17) pages in length.

3 Failure to timely file objections to any factual or
4 legal determinations of the Magistrate Judge will be considered
5 a waiver of a party's right to de novo appellate consideration
6 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
7 1121 (9th Cir. 2003) (en banc). Failure to timely file
8 objections to any factual or legal determinations of the
9 Magistrate Judge will constitute a waiver of a party's right to
10 appellate review of the findings of fact and conclusions of law
11 in an order or judgment entered pursuant to the recommendation
12 of the Magistrate Judge.

13 DATED this 9th day of December, 2008.

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16 _____
17 Mark E. Asper
18 United States Magistrate Judge
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